



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

November 25, 2003

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Avenue, Room 201
El Paso, Texas 79901

OR2003-8499

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191725.

The Office of the District Attorney for the 34th Judicial District (the "district attorney") received a request for information pertaining to cause number 20010D03468. You state that you have released court-filed documents from the case file to the requestor. See Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (information filed with a court is generally a matter of public record and may not be withheld from disclosure). You also state that you have released basic information from the case file pursuant to section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). You state that the information submitted in Enclosure 7 is not responsive to the present request. Thus, this ruling will not address that information, and the district attorney need not release it in response to this request. You claim that the remaining requested information is excepted from disclosure under sections 552.022, 552.101, 552.103, 552.108, and 552.130 of the

Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes an arrest warrant affidavit. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Code Crim. Proc. art. 15.26) (emphasis added). Thus, the warrant and supporting affidavit are public under article 15.26. As a general rule, the exceptions found in chapter 552 of the Government Code do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrant supporting affidavit that we have marked must be released to the requestor.

Section 552.108(a)(1) of the Government Code excepts from required public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform us that the submitted information relates to a pending prosecution, and its release would interfere with the district attorney’s detection, investigation, and prosecution of a crime. Based on your representations, we conclude that you have demonstrated that section 552.108(a)(1) is applicable in this instance. *See Houston Chronicle*, 531 S.W.2d 177 (court delineates law enforcement interests that are present in active cases).

We note, however, that section 552.108 protects the governmental body’s interests and, consequently, can be waived by the governmental body. *See* Open Records Decision

¹We note that section 552.022 of the Government Code does not constitute an exception to disclosure under the Public Information Act (the “Act”). Accordingly, we do not address your claim that any portion of the requested information is excepted from disclosure under section 552.022 of the Government Code.

No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). The requestor has limited the scope of the instant request “to the materials which [she has] already inspected,” and contends that the documents at issue are no longer excepted from public disclosure under section 552.108.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87; *see also Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) (“[A] due process violation [under *Brady*] has occurred if a prosecutor: (1) fails to disclose evidence, (2) favorable to the accused, (3) which creates a probability of a different outcome.”). You contend that the district attorney previously disclosed the case file to the requestor to comply with the constitutional requirements of due process. Accordingly, we find that disclosure to defense counsel under these circumstances did not waive the district attorney’s claim under section 552.108 of the Government Code. *See* Open Records Decision Nos. 579 at 9 (1990) (exchanging information among litigants in informal discovery is not voluntary release of information for purposes of statutory predecessor to Act), 454 at 2 (1986) (where governmental body disclosed information because it reasonably concluded it had constitutional obligation to do so, it could still invoke law enforcement exception). We therefore conclude that, with the exception of basic information, which you state has already been released, the district attorney may withhold the remainder of the case file from disclosure pursuant to section 552.108(a)(1) of the Government Code.

In summary, the arrest warrant supporting affidavit that we have marked must be released to the requestor. With the exception of basic information, the district attorney may withhold the remainder of the requested information from disclosure pursuant to section 552.108(a)(1) of the Government Code.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

²Because we are able to make a determination under section 552.108(a)(1), we do not reach your other claimed exceptions to disclosure.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 191725

Enc. Submitted documents

c: Ms. Theresa Caballero
300 East Main, Suite 1136
El Paso, Texas 79901
(w/o enclosures)